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CHARLES ELMORE

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1931.

No. 36

LOUISIANA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

versus

THE TEXAS & NEW ORLEANS RAILROAD COMPANY, ET ALS.,
Appellees.

No. 37

STATE OF LOUISIANA AND LOUISIANA PUBLIC SERVICE COMMISSION,
Appellants,

versus

THE UNITED STATES OF AMERICA, ET ALS.,
Appellees.

Appeals from the District Court of the United States for the Eastern District of Louisiana.

BRIEF ON BEHALF OF CARRIERS, APPELLEES.

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New Orleans,
September 30, 1931.

Montgomery-Andrus Printing Co., Inc., 430-32 Chartres, N. O., La.

SUBJECT INDEX.

	Page
Statement of the Case	1
The Issues	5
Argument	5
Conclusion	38

TABLE OF AUTHORITIES AND STATUTES.

Alabama v. United States, 283 U. S. 776 ..... 31, 32
American Express Company v. Caldwell, 244 U. S. 617 ..... 14, 15, 17
Arkansas Railroad Commission v. Chicago, Rock Island and Pacific Railroad Company, 274 U. S. 597 19
Board of Railroad Commissioners of North Dakota v. Great Northern Railway Company, 281 U. S. 412 ..... 19, 20
Chicago, Milwaukee and St. Paul Railway Company v. Tompkins, 176 U. S. 167; 90 Fed. 363 34
Ex Parte 74 Increased Rates, 58 I. C. C. 220 18
Florida v. United States, 282 U. S. 194 ..... 20, 23, 24, 26, 30, 31, 38
Georgia Public Service Commission v. Atlantic Coast Line Railroad Company, 146 I. C. C. 717 ..... 20, 21, 22, 23
Georgia Public Service Commission v. United States, 283 U. S. 765 ..... 31, 32
Houston East & West Texas Railway Company v. United States, 234 U. S. 342 ..... 13, 14
Illinois Central Railroad Company v. State Public Utilities Commission, 245 U. S. 493 ..... 15, 16, 17
Interstate Commerce Act, 24 Stat. at Large 379, as amended, Section 3 (1) 12, 13, 14
Interstate Commerce Act, 24 Stat. at Large 379, as amended, Section 13 (4) 12, 18
Interstate Commerce Act, 24 Stat. at Large 379, as amended, Section 15a (2) 13, 17, 19
Interstate Commerce Acts Annotated, Vol. 1, p. 379 34
Louisville & Nashville Railroad Company v. Interstate Commerce Commission, 184 Fed. 118 36
Mileage for Mississippi Crossings, 93 I. C. C. 462 ..... 35, 36
New York v. United States, 257 U. S. 591 19
Sand, Gravel, Crushed Stone and Shells within the Southwest, #17000 Rate Structure Investigation, Part 11 Sand and Gravel, 156 I. C. C. 247; 157 I. C. C. 496 ..... 2, 6, 7, 8, 9, 10, 11
State of Florida v. United States, 30 Fed. (2) 116, 31 Fed. (2) 580 ..... 22, 23
United States v. Illinois Central Railroad Company, 263 U. S. 515 ..... 33, 34
Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad Company, 257 U. S. 563 18

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STATEMENT OF THE CASE.

These two cases consolidated for trial (R. pp. 215-6) come up by appeal from the final decree in each case

(R. pp. 156-7, 1159) by a Three Judge Court sitting in the Eastern District of Louisiana. (Reported *41 Fed.* [2] *293*). Both cases grew out of the refusal of the Louisiana Public Service Commission to authorize the carriers to publish and apply on intrastate traffic within Louisiana (save to a very limited extent) rates on sand, gravel and related commodities, prescribed by the Interstate Commerce Commission in the proceeding before it entitled *Sand, Gravel, Crushed Stone and Shells Within the Southwest, #17000, Rate Structure Investigation, Part 11, Sand and Gravel* in its opinion and order of June 3, 1929 (*155 ICC 247*, R. pp. 15-70) as supplemented by its opinion and order of September 30, 1929 (*157 ICC 498*, R. pp. 70-75). In those opinions and orders the Interstate Commerce Commission had found reasonable and prescribed a certain scale of rates on the commodities involved for application on interstate traffic within the territory in question, including that portion of Louisiana lying west of the Mississippi River, and had also found that the intrastate rates between points in the said portion of Louisiana (and also the City of New Orleans and three other places on the east bank of the Mississippi River) were unduly and unreasonably advantageous, preferential and prejudicial as between persons and localities in Louisiana intrastate commerce on the one hand and interstate commerce on the other hand, and also caused undue, unreasonable and unjust discrimination against interstate commerce; and for the purpose of removing such advantage, preference, prejudice and discrimination had prescribed for intrastate application between points in the said Louis-

ana territory rates and charges not lower than those prescribed for application on interstate shipments. On August 30, 1929, the carriers applied to the Louisiana Public Service Commission for authority to publish and apply on shipments between points in the said Louisiana territory the rates and charges prescribed by the Interstate Commerce Commission (R. pp. 75-9). On October 12, 1929, the Louisiana Public Service Commission entered its order No. 675 (R. pp. 80-93) authorizing publication and application of the rates in question in that portion (a very small one) of the State of Louisiana on and above the line of the Vicksburg, Shreveport & Pacific Railroad Company (now Yazoo & Mississippi Valley Railroad Company), but denied the application as to all other portions of the State, except that the application was granted as to rates and charges on shipments from points in the balance of the Louisiana territory involved to points in the little northern strip of the State as to which the application was granted. The order of the Interstate Commerce Commission becoming effective on October 17, 1929, the carriers on October 16, 1929, filed their bill in Case No. 194 (R. pp. 1, et seq.) in the United States District Court for the Eastern District of Louisiana, seeking to enjoin the Louisiana Public Service Commission from interfering with them in charging and collecting on shipments between points in the entire Louisiana territory involved, the rates and charges prescribed by the Interstate Commerce Commission. On the same day an appropriate restraining order was granted (R. pp. 94-6). Answer being filed by the Louisiana Public Service Commission (R. p. 96)—and also

a supplemental answer (R. p. 114), and interventions being filed by the City of New Orleans (R. p. 126) and the Louisiana Highway Commission (R. p. 116), there was a hearing on October 30, 1929, on plaintiffs' rule for a temporary injunction, and on November 11, 1929, a temporary injunction was issued as prayed for (R. pp. 148-49). Before the suit of the carriers (No. 194) came up for final hearing, the State of Louisiana and the Louisiana Public Service Commission filed, in the same court, a bill directly assailing the order of the Interstate Commerce Commission in so far as it sought to prescribe intrastate rates south of the line of the Vicksburg, Shreveport & Pacific Railroad, which bill (No. 202) will be found at pages 162 to 175 of the Record. In this direct suit of the State, the City of New Orleans (R. p. 182) and the Louisiana Highway Commission (R. p. 176) intervened, likewise assailing the order of the Interstate Commerce Commission in so far as it sought to prescribe intrastate rates within the State of Louisiana south of the line of the Vicksburg, Shreveport & Pacific Railroad. The carriers which were plaintiffs in proceeding No. 194 (with certain immaterial exceptions) intervened in proceeding No. 202, praying that there be judgment dismissing the bill (R. p. 198). The United States (R. p. 208) and the Interstate Commerce Commission (R. p. 211) filed answers, and an order was entered consolidating the two cases, Numbers 194 and 202, for trial (R. pp. 215-6). The cases as consolidated came up for final hearing on January 16, 1930 (R. p. 150). On behalf of the complainants in No. 194 the only evidence offered was a copy of the report and order of the Interstate

Commerce Commission of June 3, 1929, a copy of the report and order of the Interstate Commerce Commission of September 30, 1929, a copy of the application of the carriers to the Louisiana Public Service Commission to apply on intrastate shipments within Louisiana the rates prescribed by the Interstate Commerce Commission and a copy of the opinion and order of the Louisiana Public Service Commission of October 12, 1929, refusing to comply with the order of the Interstate Commerce Commission (R. pp. 150-1). The only additional evidence offered on behalf of complainants in case No. 202 consisted of copies of the proceedings before the Interstate Commerce Commission out of which the orders in question grew (R. pp. 151-2). The Three Judge Court, on June 11, 1930, entered its decree perpetuating the injunction in favor of the carriers in case No. 194 (R. pp. 156-7) and its decree dismissing the bill of the State of Louisiana, et als., in case No. 202 (R. p. 1159). As already stated the two cases were handled together and, therefore, but a single opinion was handed down, which will be found in the Record at pages 154-6 and 1157-9, reported *41 Fed.* [2] *393.*

THE ISSUES.

The attack on the order of the Interstate Commerce Commission is principally based on a charge that there were no sufficient findings by that commission of discrimination against interstate shippers and localities or interstate commerce generally which would warrant the entry by the said commission of an order prescribing rates on intrastate traffic within Louisiana, save in that limited

portion of the State on and north of the line of the Vicksburg, Shreveport & Pacific Railroad, and that in any event there was no evidence adduced before the said commission which would warrant such findings or the entry of such an order.

ARGUMENT.

As will appear from its report and order, the Interstate Commerce Commission made an exhaustive investigation into the rates on the commodities in question and the circumstances and conditions surrounding their transportation, within and between the States of Arkansas, Oklahoma, Texas and Louisiana, west of the Mississippi River and, as a result of this thorough study of the situation, prescribed, for uniform application throughout the said territory, a scale of rates which will be found at pages 62 and 78 of the Record. The original report of the Commission dated June 3, 1929, *155 I.C.C. 247*, consisted of 37 pages and occupies 47 pages (15 to 62) of the Record in the present case. The Commission's supplemental report of September 30, 1929, (*157 I.C.C. 498*) which but slightly modified the original report and not in particulars involved in the present controversy, will be found at pages 70 *et seq.*, of the Record. The rates were primarily prescribed for application on interstate traffic. They were acquiesced in by the regulatory bodies of the States of Texas, Arkansas and Oklahoma; but not by the Louisiana Public Service Commission. Accordingly, the Interstate Commerce Commission, after appropriate findings of discrimination, entered a thirteenth section order as to the Louisiana intrastate rates.

As stated by the Commission, in the first paragraph of its report, intrastate rates within Louisiana were first assailed in what are commonly designated "Complaint and Answer Cases" (Numbers 16002 and 18702 of the Commission's Docket), as distinguished from the general investigation inaugurated by the Commission and it was only after testimony had been taken in the "Complaint and Answer" cases, that the Commission instituted a general investigation into the rates in question in the four Southwestern states above mentioned, such investigation expressly including the question of intrastate rates within Louisiana. See the Commission's notice of June 13, 1927, instituting the said investigation (R. p. 382).

The Commission pointed out, at page 255 of its opinion, that there were three different intrastate scales applying on the traffic in question within Western Louisiana, one on what may be termed "Commercial Shipments", another considerably lower known as the "Municipal Scale", applying on shipments consigned to the proper municipal officer to be used in the construction of public buildings such as court houses and buildings of like public nature, and a third which moved probably from 80% to 85% of the traffic, known as the "Good Roads Scale", applying on shipments to be used in the construction of parish and state public roads, or in the construction of streets, when such shipments were consigned to, and the freight charges were paid by, the federal, state, parish or municipal government. Since what we are here concerned with is a comparison of the so-called "Louisiana Good Roads Scale" with the scale prescribed by the Interstate Com-

merce Commission, we have prepared the following table showing the two scales for single line hauls.

Distances Miles	Louisiana Good Roads Scale	Interstate Commerce Commission Scale
10 and under	40	50
20 and over 10	40	56
30 and over 20	50	62
40 and over 30	50	68
50 and over 40	50	74
60 and over 50	50	80
70 and over 60	50	85
80 and over 70	60	90
90 and over 80	60	95
100 and over 90	60	100
110 and over 100	60	105
120 and over 110	60	110
130 and over 120	60	115
140 and over 130	80	120
150 and over 140	80	125
160 and over 150	80	130
170 and over 160	90	135
180 and over 170	90	140
190 and over 180	90	145
200 and over 190	90	150
210 and over 200	90	
220 and over 210	100	160
230 and over 220	100	
240 and over 230	100	
250 and over 240	100	170
260 and over 250	100	
270 and over 260	100	
280 and over 270	120	180
290 and over 280	120	
300 and over 290	130	
310 and over 300	130	190
320 and over 310	130	
330 and over 320	130	
340 and over 330	130	200
350 and over 340	140	
360 and over 350	140	
370 and over 360	140	210
380 and over 370	140	
390 and over 380	140	380 Miles
400 and over 390	140	to 410 Miles 220

Since the Commission, found that the average haul within Louisiana is from 75 to 80 miles, it is of interest to note that the Louisiana rate for this distance is 60c per ton whereas the corresponding rate prescribed by the Interstate Commerce Commission for the same distance is 90c for a single line haul. The Commission's finding, that the traffic in question constituted 11.8% of the total tonnage handled by class 1 railroads in the Southwestern region, is not questioned, so the importance of the case becomes readily apparent. In this regard the Commission found (its report, p. 281) that, had the rate prescribed by the Interstate Commerce Commission been applied to the 475,145 tons of this traffic shipped intrastate to the Louisiana Highway Commission alone from points in western Louisiana during the twelve month period from October 1, 1926 to October 1, 1927, the total charges would have been increased by more than $100,000.00. If there should be any attempt to minimize the very substantial amount at stake, or to question the fact that the maintenance of the rates prescribed by the Interstate Commerce Commission would not affect the traffic, attention is directed to Article 10 of the bill of complaint of the Louisiana Public Service Commission in case No. 202, which will be found at pages 172 to 173 of the Record, in which the judicial averment is made that:

> "If the said order of the Interstate Commerce Commission remains in effect in the said territory in western Louisiana south of the line of said Vicksburg, Shreveport & Pacific Railway, the said Louisiana intrastate freight rates and charges on shipments of sand, gravel, crushed stone and shells, and other related commodities, used for road building, purchased and shipped and the freight charges

thereon paid by said State, will be illegally increased by the sum of more than one hundred thousand ($100,000) dollars annually."

The record is replete with testimony as to the discrimination against producers of sand and gravel situated outside of Louisiana in endeavoring to market their product in Louisiana, in competition with Louisiana producers having the benefit of the much lower Louisiana rate. Much, but by no means all, of this testimony was levelled at that portion of the State of Louisiana, on and north of the line of the Vicksburg, Shreveport and Pacific Railroad, this being true largely because the complaint and answer cases were levelled particularly at the discrimination in this limited territory, and much capital is sought to be made of the fact that in its numbered findings, at pages 278 to 280 of its report, the Interstate Commerce Commission restricted its discrimination findings to this limited territory. This was due to the fact that these particular discrimination findings were responsive solely to the two complaint and answer cases as is conclusively shown by the fact that, in these numbered findings, particularly No. 5, at pages 279 and 280 of its report the Commission refers to "Defendants in No. 16602" and "Defendants in No. 18702", and on page 281, in its discussion under the caption of "Intrastate Rates" pointed out that no separate order would be entered in regard to this particular limited discrimination previously found since it would be embraced within the general discrimination findings.

And in dealing with the general issues, after first finding that the circumstances and conditions affecting transportation within that portion of the State of Louisi-

ana, on and west of the Mississippi River, including points in that State on both banks thereof and between points in said portions of Louisiana and points in Oklahoma Arkansas and Texas are substantially similar (Report, p. 282), the Commission then immediately following proceeded to make the following specific finding of discrimination:

> "We further find that the rates set forth in Appendix 2 will be maximum reasonable rates for application by respondents in No. 17000, Part 11, to the interstate transportation of the commodities described in Appendix 1, in straight or mixed carloads, between points in Arkansas, Oklahoma, and Texas, on the one hand, and points in that portion of Louisiana lying west of the Mississippi River, referred to as western Louisiana, on the other, and that said respondents' rates for intrastate application on said commodities within western Louisiana, as compared with the corresponding interstate rates on said commodities between points in Arkansas, Oklahoma, and Texas and points in said western Louisiana, to the extent that said intrastate rates are lower, distance considered, than said corresponding interstate rates, result and will result in undue preference and advantage of shippers and receivers of freight in intrastate commerce within said western Louisiana and in undue prejudice to shippers and receivers of freight in interstate commerce between points in Arkansas, Oklahoma, and Texas and points in western Louisiana, and in unjust discrimination against interstate commerce.
>
> "We further find that said undue preference and prejudice and unjust discrimination can and should be removed by the establishment and maintenance of the rates set forth in Appendix 2 as intrastate rates between points in Western Louisiana, and as interstate rates between points in Arkansas, Oklahoma, and Texas, on the one hand, and points in western Louisiana, on the other."

Direct statutory authority for the action of the Commission will be found in Section 13, (4) of the Interstate Commerce Act (*Act of February 4, 1887, 24 Stat. at Large 379*, as amended), which, after providing in the previous paragraph the machinery for an investigation by the Interstate Commerce Commission into intrastate rates, says:

> "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Also bearing on the matter is Section 3 (1) of the Act reading as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to sub-

ject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Consideration should be given also to *Section 15a (2)* of the Act providing:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

In the Shreveport Case *(Houston, East and West Texas Railway Company v. United States), 234 U. S. 342*, which was an action to set aside an order of the Interstate Commerce Commission finding unjustly discriminatory certain intrastate rates within the State of Texas, and requiring that the carriers desist from charging higher interstate rates than were contemporaneously charged on the intrastate traffic, this Court, speaking through the present Chief Justice, upheld the right of Congress to regulate intrastate rates which were unjustly discriminatory against shippers and localities in interstate commerce, and the order of the Commission was upheld as a valid

exercise of power even though it indirectly affected intrastate commerce, since the Commissioner's order gave the carriers the choice of removing the discrimination by either reducing the intrastate rates or increasing the state rates. That case was based solely on the Third Section of the Interstate Commerce Act, and dealt only with discrimination between persons and localities.

The next important discrimination case was *American Express Company v. Caldwell, 244 U. S. 617.* There the Interstate Commerce Commission, after a comprehensive investigation into express rates, prescribed a certain system of such rates in interstate transportation. The State of South Dakota refused to adopt the national system, prescribing substantially lower rates. Shippers of Sioux City, Iowa, complained that the difference between the interstate rates, which they had to pay in making shipments into South Dakota, and the state rates which their South Dakota competitors paid, resulted in unjust discrimination against them, and undue advantage to their competitors. Accordingly, an appropriate proceeding was brought before the Interstate Commerce Commission, which found that the unjust discrimination charged existed and prohibited the carriers from charging higher rates for the transportation of shipments by express between Sioux City, Iowa, and points in the State of South Dakota than were contemporaneously demanded for transportation under similar circumstances and conditions, for substantially equal distances between five named origins in South Dakota on the one hand, and said points in the State of South Dakota on the other hand. The report, in a general way, condemned the South Dakota rates as too low but it did

not expressly state that the intrastate rates should be raised, nor did it enumerate the competitive points in South Dakota, to which the rate adjustment should apply. The carriers, after vainly applying to the Board of Railroad Commissioners of South Dakota for relief (that Board absolutely denying the authority of the Interstate Commerce Commission to prescribe state rates) formally presented to the said Board tariffs carrying rates on the basis prescribed by the Interstate Commerce Commission from the origins named to all destinations in the State. Thereupon the state authorities brought a proceeding in the state courts to enjoin the Express Companies from putting into effect the said tariffs covering all of their rates within the state, to and from the five cities named. From a decree of the district court granting the relief sought, the matter was brought to this court, which reaffirmed the power of the Interstate Commerce Commission to remove any existing discrimination against interstate commerce by directing a change in intrastate rates prescribed by state authority, but concluded, however, that the order of the Interstate Commerce Commission was levelled at only those state rates from the five cities named to points commercially tributary both to the five cities and to Sioux City. Accordingly, this court held that to that extent the injunction should not have been granted, but that beyond that the injunction was properly issued.

Illinois Central Railroad Company v. State Public Utilities Commission, 245 U. S. 493, grew out of an order of the Interstate Commerce Commission dealing with discrimination found to result from a disparity in interstate and intrastate passenger rates, because of an increase in

the interstate rates without a corresponding increase in the state rates in Illinois. St. Louis, Missouri, and Keokuk, Iowa, on the west bank of the Mississippi River, were placed at a disadvantage in Illinois traffic with their respective rivals East St. Louis and Hamilton, both in Illinois on the east bank of the river. Appropriate proceeding being brought before the Interstate Commerce Commission, it was found that contemporaneous maintenance between East St Louis and Hamilton, respectively, and other points in Illinois of rates on a lower basis than those maintained via the same routes between St. Louis and Keokuk, respectively, and the same points in Illinois, bridge tolls excepted, gave an undue preference to East St. Louis and Hamilton and to intrastate passenger traffic to and from the latter points, and subjected St. Louis and Keokuk and interstate passenger traffic, to and from these cities, to an unreasonable disadvantage. The Commission ordered in rates not exceeding 2.4c per mile between St. Louis and Keokuk respectively and points in Illinois. The Commission then prescribed that the carriers should not charge fares on a higher basis to the complaining points than the basis per miles for fares contemporaneously maintained between the points complained against, and the same Illinois points. The carriers interpreted the order as applying to all rates on state traffic in the State of Illinois and published tariffs accordingly. Both by a direct attack, and by the usual form of injunction proceeding by the carriers, the matter was brought to this court which held that the final order and finding of the Interstate Commerce Commission were uncertain and indefinite, in that it was not made clear whether only those intrastate rates which resulted in discrimination against interstate traffic

to and from St. Louis and Keokuk were intended to be affected, or as claimed by the carriers, all of the intrastate rates. In reaching this conclusion the court, on page 502, quoted as follows from *American Express Company v. Caldwell, supra:*

> "Where a proceeding to remove unjust discrimination presents solely the question whether the carrier has improperly exercised its authority to initiate rates, the Commission may legally order, in general terms, the removal of the discrimination shown, leaving upon the carrier the burden of determining also the points to and from which rates must be changed, in order to effect a removal of the discrimination. But where, as here, there is a conflict between the federal and the state authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under state authority, unless, and except so far as, it is definite as to the territory of points to which it applies. For the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic."

The foregoing decisions all dealt with the Interstate Commerce Act as it stood prior to the enactment of the Transportation Act 1920 (*Act of February 28, 1920, 41 Stat. at Large 456*). This latter statute made various important changes in the Interstate Commerce Act, among them the creation of the right in the Interstate Commerce Commission of prescribing intrastate rates on a finding of unjust discrimination against interstate commerce generally, and the imposition on the Commission of the duty of keeping the rates of the Carriers as a whole on a basis which would enable them to earn a fair rate of return. These changes will be found in sections 13 and 15a, from

which we have hereinabove quoted the more important parts. The first case interpreting these new provisions of the Act was *Wisconsin Railroad Commission v. Chicago, Burlington & Quincy Railroad Company, 257 U. S. 563.* There the Interstate Commerce Commission, in a proceeding known as "*Ex parte 74, Increased Rates, 58 I.C.C. 220*", had, in order to comply with Section 15a of the Interstate Commerce Act, prescribed horizontal increases in rates throughout the country. In the group of which the Wisconsin carriers were a part, the increase in passenger rates prescribed amounted to 20%. The carriers applied to the Wisconsin Railroad Commission for corresponding increases in the intrastate rates and fares, which was granted as to freight rates, but as to passenger fares was denied on the sole ground that a state statute prescribed a maximum for passengers fares of 2c a mile. Thereupon the carriers brought a thirteenth section proceeding before the Interstate Commerce Commission, which found the discrimination charged to exist, and prescribed for intrastate application within the State of Wisconsin the rates already approved by it in *Ex parte 74.* While this Court conceded that in many instances the lower state fares would work a discrimination against interstate passengers, still there were instances in which the lower state fares could not conceivably result in any such discrimination, and accordingly this court held that it could not approve the state-wide order on the showing of discrimination against persons or places alone. However, the order was upheld on the ground that the lower level of the Wisconsin state rates constituted a discrimination against interstate commerce generally. This conclusion was reached on the strength of paragraph 4 of section 13 of the act, the

court pointing out the close relation between that provision and the purpose of paragraph 15a.

Under substantially similar conditions a like result was arrived at in *New York v. United States, 257 U. S. 591.*

Arkansas Railroad Commission v. Chicago, Rock Island & Pacific Railroad Company, 274 U. S. 597, dealt with intrastate rates involved in two related proceedings before the Interstate Commerce Commission. In one of these proceedings there was an express finding that the state rates were discriminatory, coupled with an order that the discrimination should be removed. This being done, the corresponding interstate rates were slightly increased in the other case, but the Commission made no findings and entered no order with reference to the intrastate rates. The carriers considered that since, in the first case, discrimination was found and the state rates ordered on a parity with the interstate rates, the change of the interstate rates on the second case necessarily carried with it an increase in the state rates. This Court pointed out that there must be an express order of the Interstate Commerce Commission finding the state rates discriminatory and ordering the removal of the discrimination, and that in the absence of such an order in the second case, the state rates could not be affected.

Board of Railroad Commissioners of North Dakota v. Great Northern Railway Company, 281 U. S. 412, was an attempt by the carriers to have the courts condemn certain state rates as unjustly discriminatory without a prior finding and order to that effect by the Interstate Com-

merce Commission. The Interstate Commerce Commission had instituted an investigation into certain rates and at about the same time the State Commission embarked on an investigation of its own, and before any action by the Interstate Commerce Commission entered an order reducing certain state rates. Thereupon the carriers filed a Thirteenth Section complaint with the Interstate Commerce Commission assailing the order of the state commission on the ground that the reduced rates prescribed would unjustly discriminate against persons and localities in interstate commerce and would constitute an unreasonable burden on interstate commerce. At the same time the present action was brought to restrain the state commission from putting into effect the reduced rates until the Interstate Commerce Commission could act in the matter, whether in connection with its original investigation or in connection with the contemporaneously brought Thirteenth Section complaint. It was held that discrimination must be found by the Commission before the courts can act.

Florida v. United States, 282 U. S. 194, is to such an extent relied on by the appellants that in order to give the Court a full and accurate picture of the exact issues involved, we shall carefully and in detail analyze the case, and we believe that this will demonstrate that that decision is totally inapplicable to the case at bar.

Turning to the decision of the Commission assailed in the Florida case, *Georgia Public Service Commission v. Atlantic Coast Line Railroad Company, 146 I.C.C. 717*, we find that the Georgia Public Service Commission attacked log rates from points in Florida on the lines of the Atlantic Coast Line to destinations in Georgia on the said railroad

as unjust and unreasonable, and as compared with rates applicable intrastate within Florida, unjustly discriminatory and unduly prejudicial. In this regard we quote from page 719 of the Commission's report:

> "While complainant assails the rates from all points on defendant's lines in Florida to all points on its lines in Georgia, the record shows that in so far as the interstate rates are concerned relief is desired only with respect to rates on logs, except walnut, cherry, and cedar, from that portion of Florida lying north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs, hereinafter referred to as north Florida, to destinations in Georgia for distances not exceeding 170 miles."

It appeared that the Florida state rates were considerably lower than the interstate rates generally applicable in that territory, and considerably lower than the interstate rates found reasonable and prescribed by the Commission in the said case, the prescribed rates being set forth in the findings at page 724. It is noteworthy that the interstate rates were prescribed for application only in the northern portion of Florida, such rates not being prescribed in the southern portion of Florida. While the rates prescribed for interstate application seem to have been similar to, if not quite the same as, other interstate rates applicable to the same general territory, it is not to be overlooked that the Florida case was not an investigation culminating in a general fixing of rates in a large territory, but was a case of a local character. No movement of logs from Florida to Georgia was shown and complainants stated that there could be none, because of the substantially higher level of the rates interstate than intrastate (p. 722). There was a sharp controversy as to the cost of

performing the services, each side furnishing an estimate as to which the Commission said at the bottom of page 728:

> "Neither can be accepted to show the approximate actual cost of transporting logs in single carloads intrastate throughout Florida."

There was testimony to the effect that any material increase in the Florida, or intrastate rates, would either cause the Florida mills to move their plants to the timber, or abandon operations, in either of which events the carrier would lose considerable traffic (p. 728). The carrier proposed a scale somewhat lower than the then current interstate scale, which scale was the one accepted by the commission as reasonable and prescribed by it (p. 728). The Florida state rates were found discriminatory and this discrimination was ordered removed by the application, within Florida, of rates corresponding with those found reasonable for interstate application from the northern part of Florida to Georgia. Thereupon the State of Florida brought a suit assailing the order of the Commission as being outside the scope of the issues raised in the proceeding in which the order was entered and without substantial evidence to support it, and as extending beyond the statutory authority of the Commission and the limits of federal power under the Constitution. Taking the view that, if construed so as to apply to intrastate rates throughout the State, the order would probably be invalid, the Court sustained it on the assumption (contrary to that of the Commission) that it was limited to intrastate rates on the Atlantic Coast Line Railroad in the northern part of Florida as to which the Commission had entered the order for raising intrastate rates. *State of Florida v. United States, 30 Fed. (2) 116.* The Commission then, without any further hearing, amended

its order in regard to intrastate rates by substituting for the phrase "within the State of Florida" the words "within and throughout the entire State of Florida, without exception". The Court reopened the case and construed the order in its statewide operation not "because of undue prejudice to shippers and localities, or because of undue discrimination against any particular interstate commodity in the described logs, but solely upon the ground that the order was aimed at a discrimination "against general interstate commerce" caused by intrastate rates which were so low as to throw an undue burden upon the interstate revenues of the carrier. *31 Fed. (2) 580.*

This Court held that the portion of the order of the Commission with respect to intrastate rates was not supported by the findings of the Commission, and accordingly set it aside, saying at pp. 214-5:

> "The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service."

It will be seen from the foregoing statement that in the Florida case the Commission itself made no findings that there would be any increase in revenue resulting from raising the intrastate rates, but, on the contrary, as this Court pointed out at page 214 of its opinion:

> "The Commission stated in its report that witnesses for the Florida intervenors had testified

that any substantial increase in the Florida intrastate rates would either cause them to move their plants to the timber or abandon operations, and that in either event the carrier would lose considerable traffic.

In this regard the facts in the Louisiana case are significantly different, as we shall later point out. The findings in the instant case admit, and the findings of the Commission in this case show, that had the higher level of intrastate rates applied for the years in which figures were compiled the increased revenues would have been more than $300,000.

Normally, an increase of rates would mean an increase in revenue, and that this was not true in the Florida case was affirmatively shown because of economic conditions peculiar to the lumber business, which is necessarily of a highly competitive character. In the instant case, the complainants are the State and municipal authorities, who are not engaged in any business of a competitive character and who have, from ordinary economic influences, their need for the commodity being for the purpose of constructing roads. And as it is clear that an increase in the intrastate rates would not prevent the movement and would increase the revenues of the Carriers from this traffic.

Considering now the record, opinion and findings of the Commission in the Louisiana case, it will be found that the [illegible] and it is submitted that the [illegible] of the Commission in the present [illegible] with the law as interpreted in the Florida case.

No contention was made in the pleadings or evidence in the Louisiana case that the increase in the Louisiana interstate rates would in any manner curtail the volume of movement of traffic. On the contrary, in the bill of the Louisiana Public Service Commission, et al., to set aside the order of the Commission, it is expressly alleged, conceded and admitted that if the order of the Commission remains in effect, the freight paid will be increased correspondingly with the increase in the rates. See paragraph 10 of the bill (R. p. 172-173) to the effect that the increased rates will result in the payment of increased charges by the state in the sum of more than $100,000.00 annually, and in this connection see the finding of the Commission at page 281 of its report to the effect that, based on actual past performance, the collection of charges on the basis of the interstate rates would exceed those collected on the basis of state rates by more than $100,000.00. In other words, it is the position of the interests now attacking the order of the Commission that this traffic will continue to move, and that there will be, unless such order is set aside, an increase in the carriers' revenue of more than $100,000 annually.

If the Louisiana authorities, entirely familiar with the gravel situation, especially as most of it moves to public bodies, had considered as a serious possibility that the scale made by the commission would lessen the movement of gravel, it would have been very simple to present that view in pleadings and evidence (if any could be found) as was done in the Florida case. We submit that it is quite clear that any such suggestion is a mere afterthought, never intended or suggested as a present possibility.

It may be argued that the absence of a finding in the report of the Commission in the precise language of this Court used in the Florida case (pp. 214-5), hereinabove set out, must result in a nullification of the order of the Commission. If the substance of the report of the Commission is of such scope, in view of the findings and statements of fact contained therein, as to permit of no other conclusion than that the Commission of necessity considered and passed upon the matters involved, we assume that no one will contend that, because of a possible slight variation from the verbiage of the above quoted language from the decision of this Court in the Florida case, the order of the Commission is not valid and in substantial compliance with the law.

As distinguished from the contents of the Commission's report in the Florida case, the report in the instant cases contains findings of fact and conclusions which this Court found absent in the Florida case. For illustration, the following is found at page 252 of the Commission's report in the Louisiana case:

> "These commodities move in great volume in the Southwest and produce a substantial part of the carriers' revenue. They constituted 11.08 per cent of the total tonnage handled by Class I railroads in the southwestern region in 1925. Data of record show, for example, that 2,992,639 tons of sand, gravel, crushed stone, and shells were produced during 1926 in western Louisiana, and that during the 2-year period October 1, 1925, to October 1, 1927, there were shipped to the Louisiana Highway Commission 1,236,222 tons of this road-building material for use in western Louisiana the freight charges on which amounted to $806,128."

Under the caption of "Intrastate Rates" there appears at page 281 of the report the following:

> "The Louisiana commission is not willing to authorize for application throughout that portion of Louisiana involved in No. 17000, Part 11, the interstate basis of rates herein approved. The comparatively low level of the Louisiana good-roads rates has been amply portrayed herein. Those rates move from 80 to 85 per cent of this traffic within said portion of Louisiana and on the average are about 35 per cent lower than the interstate rates herein approved, and the rates also approved by State authorities for application within those States grouped with Louisiana in this proceeding. During the 12-month period from October 1, 1926, to October 1, 1927, about 475,145 tons of these commodities were shipped intrastate to the Louisiana Highway Commission alone from points in western Louisiana. Charges were assessed on this tonnage on the basis of the Louisiana good-roads rates and amounted to approximately $300,000. Charges computed on this movement on the basis of the interstate rates herein approved would exceed those collected by more than $100,000."

It is further seen that the report of the Commission, based on facts of record, contains specific findings in regard to the comparative significance of the traffic involved, the amount of revenue involved, and the increase in revenue that will result, assuming the continuance of substantially the same volume of movement.

It is submitted that only one conclusion can be drawn as to whether or not the Commission, in deciding the case, considered the question as to whether or not the Louisiana intrastate rates prescribed would have the effect of reducing the volume of movement existing in the past,

so as to nullify any revenue increase to the carriers as a whole from the advance in such rates. The Commission did of necessity consider these matters as shown in the report itself and arrive at the conclusion that the increase, based on past volume of traffic would be representative of at least the maximum increase in the future and the resulting revenue from intrastate traffic was necessary in order to avoid undue prejudice against interstate commerce.

It will be noted, from the last quotation from the Commission's report, that the Commission finds and comments upon the fact that from 80% to 85% of this traffic within Louisiana moved on this comparatively low level of rates which on the average are about 35% lower than the interstate rates approved, and the rates also approved by state authority for application within the states of Arkansas, Oklahoma and Texas. On page 252 of the Commission's report is the following:

> "During the year 1925, sand, gravel, and crushed stone used and sold in Arkansas amounted to 2,110,603 tons; in Oklahoma 2,998,798 tons; and in Texas 8,588,916 tons. About 2,600,789 tons were originated and delivered in Texas during the period March 1 to August 31, 1925, producing a total gross revenue to the carriers of $2,663,208."

Thus the Commission finds this very substantial movement of sand, gravel and crushed stone in the state of Arkansas, Oklahoma and Texas on rates higher than the intrastate rates in Louisiana, the Louisiana rates on the average being about 35% lower. The Commission also refers to the movement of 15% or 20% constituting commercial shipments within Louisiana on the higher rates. A discussion of

various rates will be found beginning at page 254 of the report of the Commission. The lowest of the three scales in Louisiana, known as the good-roads scale, moved 80% to 85% of the traffic in western Louisiana. It is discussed at page 255. It is there found that the 9702 scale applied on intrastate movements in Arkansas and on commercial shipments within western Louisiana. The substantial movement under this scale, as found by the Commission, has been already mentioned.

At page 253 of its opinion the Commission said:

> "The averages of the joint-line and single-line hauls of this traffic in the respective State are, in Louisiana, from 75 to 80 miles; in Arkansas, from 50 to 60 miles; in Texas, from 90 to 100 miles; and in Oklahoma from 85 to 90 miles. Approximately 35 per cent of the total movement throughout the territory considered is joint line."

A comparison between the scale prescribed (Appendix 2 on page 284) and the other scales (Commission's Report p. 256-7) on which a substantial volume of movement was found in the Commission's report, clearly denotes that the scale prescribed cannot have the effect of stifling movement of the traffic. It cannot be contended that the Commission did not consider and decide that the scale prescribed in this case would not reduce the volume of traffic moving in view of these numerous comparisons with scales upon which a substantial volume of movement was found. In this connection it is important to bear in mind that the Commission (at p. 282 of its opinion) made the following express finding as to similarity of conditions throughout the territory in question:

> "We find that the circumstances and conditions affecting transportation within that portion of

the State of Louisiana on and west of the Mississippi River, including points in that State on both banks thereof, and between points in said portion of Louisiana and points in Oklahoma, Arkansas, and Texas, are substantially similar."

In the course of its discussion of intrastate rates, from which we have already hereinabove quoted, the Commission made the following express finding at page 281-2 of its opinion:

> "This is sufficient to illustrate that for us to prescribe here the approved basis of rates for interstate application throughout the considered territory and at the same time permit the continued maintenance of this relatively low basis of intrastate rates within that portion of Louisiana here involved would be tantamount to sanctioning a substantial disparity between interstate rates and intrastate rates which is bound to operate as a real discrimination against, and obstruction to, interstate commerce, and result in interstate shippers being unduly prejudiced and interstate commerce unjustly burdened. Moreover, there would exist in this particular group of States a discrimination between the States themselves which could not be justified."

It is evident that this finding considered in connection with express statements of fact and findings contained in the report hereinbefore in part referrer to, is the equivalent of a finding in the language set out in the decision of this Court in the Florida case. The finding that interstate commerce would be unjustly burdened by the continuance of the low Louisiana intrastate rates could not have been made without, what is quite obvious from the discussion contained in the report of various rate adjustments and substantial movement thereunder, a considera-

tion of the future from the standpoint of volume of movement of the traffic and resulting revenue to the carriers.

It is submitted that it is not essential that the Commission make findings in any particular stereotyped manner. If it could be reasonably said that any doubt remains representing the consideration of the maintenance of an adequate transportation system, such doubt would be completely removed by the following finding of the Commission at page 276 of its report:

> "In performing the task assigned to us by the resolution of equitably distributing the burden of transportation charges, having due regard to the natural and proper development of the country as a whole and to the maintenance of an adequate system of transportation, it is evident, as we have had occasion in the past to state, the principle of what the traffic can or will bear is a factor which must be given due consideration."

From this it is clearly demonstrated that the Commission considered what this Louisiana intrastate traffic could bear from the standpoint of rate adjustment and concluded that the rates prescribed would not adversely affect the volume of traffic moving in the future.

For the foregoing reasons we maintain that there is no real similarity between the case at bar and the situation with which this court was dealing in the Florida case. It seems to us that in addition to the clear fact that the order of the Commission now assailed is amply sustained from a revenue point of view, the facts of the case also bring it under the conclusions reached in *Georgia Public Service Commission v. United States, 283 U. S. 765*, and *Alabama*

v. United States, 288 U. S. 776, but more particularly the Georgia case. Our reading of the Georgia case leads to the conclusion that the order was sustained rather on the theory of discrimination between persons and localities than on the revenue theory.

In this connection attention is directed to Exhibit No. A-89 showing stone and sand shipped by a certain company from Little Rock, Arkansas, to various destinations which exhibit will be found at pages 1018, *et seq.*, of the Record. It is significant that many of the shipments to Louisiana destinations were to points south of the line of the Vicksburg, Shreveport and Pacific Railroad. As examples of this, shipments were made to the following points in Louisiana: Baskin, DeQuincy, Ferriday, Forest Hill, Georgetown, Grayson, Lake Charles (in the extreme southwestern part of Louisiana), Pollock, Rochelle, Splitlog Spur, Tioga, Tullos, Winnsboro and Wisner. Another Exhibit which furnishes similar information is A-95 at p. 1037 of the Record. At page 1039 will be found shipments from various Arkansas points of origin to points in Louisiana. Of these Louisiana destinations the following were south of the line of the Vicksburg, Shreveport and Pacific Railway: Baskin, Ferriday, St. Joseph, Vidalia, Winnsboro, Clayton and Gilbert, and the movement to such points was quite heavy. In connection with this aspect of the case the Court must realize that the extremely low level of the Louisiana rates was bound to act as a barrier to the shipment of sand and gravel from other states into Louisiana, and of necessity the Louisiana producer had an enormous advantage. It is perfectly clear that with rates on the same basis there would be a freer movement and, therefore, more shipments

into Louisiana from other states. We do not, of course, pretend that even with rates on the same basis the Oklahoma, Arkansas or Texas producer would not be at a disadvantage in selling his sand and gravel in Louisiana in competition with a Louisiana producer less distantly located, but we do say that under the former rate adjustment the Louisiana producers had an unfair and entirely improper advantage and that the Interstate Commerce Commission had not only the right, but it was its duty, to strike down this barrier against interstate shippers into Louisiana.

It is curious that while most of the attack on the order of the Interstate Commerce Commission is based on grounds which would apply equally to the state rates in that portion of Louisiana on and north of the line of Vicksburg, Shreveport and Pacific, still the Louisiana Public Service Commission recognized the discriminatory character of the Louisiana rates as to that limited portion of the state. It seems to us at least doubtful whether the appellants should be permitted to raise as to any part of the state questions which would have applied equally to the little northern strip as to which the discrimination existing was conceded only after entry of the order of the Interstate Commerce Commission.

We desire here to add a few brief comments on certain portions of the brief for appellants and to answer one or two points therein presented.

Attention is directed to the fact that *United States v. Illinois Central Railroad Company*, 263 U. S. 515, quoted from at page 45 of opponents' brief dealt solely with the

matter of discrimination between shippers and localities and with interstate rates only, and did not in anywise touch on intrastate rates, or *Sections 13 or 15a of the Interstate Commerce Commission Act.*

In support of the statement at p. 51 of their brief—

> "That cost of the service is an element that must be considered in fixing rates has been recognized by the Commission in many cases,"

counsel quote from *Interstate Commerce Acts, Annotated, Vol. 1, p. 379.*

The language quoted was used in reference to *Section 1 (5) of the Act* and the case, *Chicago, Milwaukee & St. Paul Railway Company v. Tompkins, 176 U. S. 167,* cited at page 52, involved an attack by a railroad company on a reduced scale of rates prescribed by a state regulatory board. The trial court dismissed the bill *(90 Fed. 363)* and this court reversed the judgment and remanded the case, stating among other things that:

> "We think, therefore, there was error in the failure to find the cost of doing the local business, and that only by a comparison between the gross receipts and the cost of doing the business, ascertaining thus the net earnings, can the true effect of the reduction of rates be determined." (p. 179).

The attack in that case was, of course, largely on constitutional grounds and it cannot be distorted so as to support the proposition that in a general investigation, such as the present case, the Commission was obligated to make express findings as to the mathematical cost of performing the service.

We confess that we do not understand the attack on the Commission's order on the ground that:

> "There is no finding or reference to evidence by the commission as to the cost of performing the ferry transfer service across the river at Angola, Baton Rouge, Harahan, and New Orleans, La., although separate ferry arbitrary charges are established by the Commission to apply on intrastate traffic at these points." (Brief for Appellants, page 52).

We imagine that counsel overlooked the fact that in *Mileage for Mississippi Crossings, 93 I.C.C. 462*, the Interstate Commerce Commission made an exhaustive investigation into the propriety of an additional charge for the service of transferring freight across the Mississippi River and not only concluded that such a charge was proper, but on a record replete with cost figures fixed a scale of charges for the different types of traffic.

While counsel did not, in their brief, refer to this decision of the Interstate Commerce Commission authorizing and prescribing an additional charge for the service of transferring freight across the Mississippi River, it is admitted at page 61 of their brief that even in Louisiana, the Louisiana Public Service Commission recognizes the unusually expensive character of this service and permits the making of an additional charge therefor.

This same charge for the service of transferring freight across the Mississippi River is made the subject of another chapter of our opponents' brief (pp. 92 to 101) on

the theory that this charge constitutes a regulation of commerce, giving a preference to the ports of the State of Texas over those of the State of Louisiana in violation of *Article I, Section 9, Clause 6 of the Constitution of the United States*. Considering what we have already said on this subject, it is sufficient to observe that there is not, and could not be any contention that the shipments to Galveston, Houston, Beaumont and other ports involved any service of crossing the Mississippi River. Besides, any such contention should have been in the form of a direct attack on the order of the Interstate Commerce Commission in *Mileage for Mississippi Crossings, supra*, and not an attempted collateral attack on that order in the present case. If any doubt should remain on this point, it is fully dispelled by *Louisville & Nashville Railroad Co. v. Interstate Commerce Commission, 184 Fed. 118, 123.*

At pages 10 and 63 of their brief counsel say that in cases #16002 and #18702 of the Docket of the Interstate Commerce Commission none of the carriers presented any question as to the unreasonableness of the Louisiana rates. If the court will turn to answer in Docket 16002 of the Iberia and Vermillion Railroad Company, Lake Charles and Northern Railroad Company, Louisiana Western Railroad Company, and Morgan's Louisiana and Texas Railroad and Steamship Company beginning at page 311 of the record there will be found in the answer to Article IV of the complaint the express averment as to the Louisiana intrastate rates that

"Said rates were and are unreasonably low."

See also the answer in the same proceeding of the Galveston, Harrisburg & San Antonio Railway Company, the

Houston East & West Texas Railway Company, Houston & Shreveport Railroad Company, Houston & Texas Central Railroad Company and Texas & New Orleans Railroad Company (beginning at page 304 of the record) which says in Article 7 thereof:

> "For other and further answer herein, defendants adopt and make their own the answer of the Louisiana Western and Morgan's Louisiana & Texas Railroad & Steamship Company, as fully as if set out at length herein."

See also the answer in the same proceeding of the Texas & Pacific Railway Company and Dennison & Pacific Suburban Railway Company, found at pages 314 and 315 of the Record in which, though in less specific language, the Louisiana intrastate rates are certainly called into question.

On pages 65 to 72 of their brief, counsel seek to make the argument that the discrimination found by the Interstate Commerce Commission was expressly limited to that portion of Louisiana located on and north of the line of the Vicksburg, Shreveport and Pacific Railroad. The error into which our opponents have fallen is due to the fact that they have failed to appreciate that finding No. 5 at pages 279 to 280 of the Commission's report was responsive solely to the complaint and answer cases Nos. 16002 and 18702 of the Commission's docket, which dealt with discrimination only in the northern part of the State, whereas the general findings under the so-called 17000 Docket in regard to the discriminatory Louisiana rates were made under the caption "Intrastate Rates" at pages 281 to 288 of the Commission's report.

We are somewhat puzzled as to the statement at page 108 of the brief that:

> "After the case had been argued in Washington, the Commission added the discussion under 'Intrastate Rates,' in which it explains fully the position of the Louisiana Commission."

There is nothing in the record on which to base a suggestion that the report of the Commission was handed down in sections.

As to the portion of the brief beginning with the language quoted and concluding on the upper portion of page 106 which puts forward the proposition that it is the sole province of the Louisiana Public Service Commission to determine whether there is in the state rates any discrimination against interstate commerce and if so to determine the extent of that discrimination and how it shall be removed, we quote from page 210 of the opinion of this court in *Florida v. United States*:

> "To hold, as some of the appellants urge, that there can be no adjustment of intrastate rates by the Interstate Commerce Commission so far as may be needed to protect interstate commerce until the State itself has first 'sat in judgment on the issue of the lawfulness of those intrastate rates' would be to impose a limitation not required by the terms of the statute and repugnant to the grant of authority."

CONCLUSION.

In conclusion we submit that the extremely low Louisiana intrastate rates not only were unjustly discriminatory against interstate shippers and localities and unduly preferential to Louisiana shippers and localities

and unduly preferential to Louisiana shippers and localities, but were unjustly discriminatory against interstate commerce as a whole and placed an undue burden on interstate commerce. The present is certainly not a favorable season for depriving carriers of the very substantial revenue involved. We most respectfully submit that the ends of justice require that the judgments in this case should be affirmed.

Respectfully submitted,

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